



Attachment A –Comments to Proposed CalPERS Regulation

ILLUSTRATIVE PROGRAMS OPERATED BY COUNTY SUPERINTENDENTS OF SCHOOLS

1. California Technology Assistance Program (statute - CDE contracts)
 - a. County superintendent administers in each of the 11 regions
2. Regional System of District and School Support, RSDSS (statute - CDE contract)
 - a. County superintendent administers in each of the 11 regions
3. Medi-Cal Administrative Activities, MAA (statute)
 - a. County superintendent administers in each of the 11 regions
4. California Preschool Instructional Network
 - a. County superintendent administers in each of the 11 regions
5. District Assistance and Intervention Teams Regional Capacity Building (Foundation funded/program has statutory basis)
 - a. County superintendent administers in each of the 11 regions
6. After School Programs Technical Assistance Network (CDE contract/program established statutorily)
 - a. County superintendent administers in each of the 11 regions
7. Regional Occupational Programs/Centers (statute)
 - a. County superintendent administers in various regions
8. Special Education Local Plan Areas (statute)
 - a. County superintendent administers in various regions
9. Migrant Education Programs (statute)
 - a. County superintendent administers in various regions
10. Federal Title III English Learner Assistance Programs (statute)
 - a. County superintendent administers in each of the 11 regions
11. Personnel Management Assistance Teams (statute)
 - a. County superintendent administers in each of 6 regions
12. CalSTRS Counselors (contracts with CalSTRS)
 - a. Various county superintendents employ classified staff to provide retirement counseling on behalf of CalSTRS
13. Advancement Via Individual Determination (AVID) Programs (statute)
 - a. County superintendent administers in each of the 11 regions
14. CCSESA Arts Initiative (foundation project)
 - a. County superintendent administers in each of the 11 regions
15. Reading Implementation Centers-RICs (federal funding/contracts under Reading First program)
 - a. Various county superintendents operate RICs to provide regional and local professional development programs in reading instruction
16. First 5 Commissions
 - a. Various county superintendents employ staff who work on behalf of local First 5 Commissions
17. California Department of Education; Secretary of Education
 - a. Various county superintendents employ staff who work on behalf of these state agencies
18. County Board of Supervisors
 - a. Various county superintendents employ staff who work on behalf of their local county boards of supervisors



Employer Services Division
P.O. Box 942709
Sacramento, CA 94229-2709
Telecommunications Device for the Deaf - (916) 795-3240
888 CalPERS (or 888-225-7377) FAX (916) 795-3005

CCSESA Public Comment
Attachment B

August 26, 2008

Superintendent
County Dent. Of Education

RE: CCSESA: REQUEST FOR ADDITIONAL DOCUMENTATION

Dear Superintendent:

The California Public Employees' Retirement System (CalPERS) is currently engaged in an administrative hearing which relates to the California County Superintendents Educational Services Association (CCSESA), and the eligibility of its staff personnel to be reported in membership to CalPERS. We require your personal response to the following questions:

1. Over the past four years, commencing with January 2004, has your County Office of Education (COE) employed non-credentialed and/or "visiting educator" staff on a contract basis to perform work on behalf of another public agency, county or region? For example, do you employ staff to carry out regional projects or do you serve as the "employer" for staff who are stationed at another agency such as, but not limited to, the California Department of Education, Secretary of Education, First 5, or CalSTRS?

If you answer yes, please provide copies of any and all writings that reflect or pertain to each such arrangement and identify any individuals under those arrangements that have been reported to CalPERS.

2. Over the past four years, commencing with January 2004, has your County Office of Education assigned non-credentialed individuals whom you consider to be employees of the County Office of Education to perform services on behalf of any other agency or entity, public or private, such as, but not limited to, the California Department of Education; Secretary of Education; First 5; CalSTRS; ACSA; CASBO; CCSESA; AVID; or CCSA?

If you answer yes, please provide copies of any and all writings that reflect or pertain to each such arrangement and identify any individuals under those arrangements that have been reported to CalPERS.

You have been requested above to provide documentation concerning such employment practices. To the extent that documents may not exist to fully substantiate these arrangements, you are requested to provide narrative information detailing these

California Public Employees' Retirement System
www.calpers.ca.gov

CONFIDENTIAL INFORMATION

CCSESA General Membership Meeting re: CalPERS Issue
October 19, 2008 Page 13 of 22

August 26, 2008

arrangements, including (1) the title and position for each such employee, (2) the entity to which the employee was assigned to work, (3) the purpose of the assignment, (4) the period of time covered under any such arrangement, and (5) whether the employee contributions for this covered period of service were reported to CalPERS.

This information is being requested pursuant to CalPERS' authority pursuant to section 20221 of the Government Code. We will expect this information to be mailed to us not later than ten (10) days from the mailing date of this letter.

Should you have any questions concerning this, please feel free to contact me at (916) 795-3127.

Sincerely,



Ronald Gow
Retirement Program Specialist
Employer Services Division



Employer Services Division
P.O. Box 942709
Sacramento, CA 94229-2709
Telecommunications Device for the Deaf - (916) 795-3240
888 CalPERS (or **888-225-7377**) FAX (916) 795-3005

December 9, 2008

Dr. Julian D. Crocker, President
California County Superintendents Educational
Services Association
1121 L Street, Suite 510
Sacramento, CA 95814

Dear Dr. Crocker:

Thank you for taking the time to submit comments relating to the proposed regulatory action by CalPERS regarding determination of employee status. This letter is in response to the comments you submitted to CalPERS in your letter dated November 19, 2008. Each of your comments, as we understand them, will be restated below, followed by CalPERS staff's responses.

We note your comments also reference a pending administrative case which has not yet come before the CalPERS Board of Administration. We will not comment on the facts or allegations relating to that pending litigation in this response.

Comment 1. The proposed regulation "fails to acknowledge longstanding statutory and co-employment relationships of county superintendents and will restrict the ability of the county superintendents to carry out their constitutional and statutory obligations as mandated by the Education Code and other California codes and regulations."

Response to Comment 1. CalPERS staff disagrees with your comment.

CalPERS did not include in the proposed regulations any discussion of statutory employment or co-employment because these topics are irrelevant to determining employee status and individual eligibility for CalPERS membership. If an individual is a common law employee of an employer that contracts with CalPERS, then that employee is eligible for membership (absent a specific statutory or contract exclusion from membership). That the employer may be the joint or co-employer of that individual with another employer, under a statutory scheme other than the PERL, is irrelevant. Similarly, whether that employer has the general statutory authority to hire employees is also irrelevant to the common law test for employment analysis.

The proposed regulations require that the term "employee" be determined using the common law test for employment. The regulations clarify, interpret and apply the Public Employees' Retirement Law (PERL), the case law and the Board's Precedential Decisions which set forth the applicable criteria of the common law test for employment.

The proposed regulations should not interfere with county superintendents carrying out obligations as mandated by the California Constitution, Education Code or other California codes and regulations because the regulations are solely drafted to apply to determinations made under the PERL.

The proposed regulations ensure that only the common law employees of an employer who has contracted to participate in the plan (regardless of whether that employer also has established a co-employment relationship with another employer for purposes other than under the PERL) are reported into membership.¹ CalPERS, as a tax-qualified governmental plan, may only provide pension benefits to a participating employer's common law employees and their beneficiaries. Thus, it is the common law test for employment that is determinative of employee status under the PERL.²

The Board has referred to the common law test for employment factors in two Precedential Decisions when examining questions relating to employee status for CalPERS membership eligibility.³ Conversely, the Board has never issued a Precedential Decision recognizing "co-employment" or "joint employment" as a basis for CalPERS eligibility or as an exception to the common law test for employment. Nor has the Board issued a Precedential Decision determining CalPERS eligibility based upon an employer's general statutory authority to hire employees.

Comment 2. The proposed regulation will likely result in the exclusion of thousands of classified school employees in good standing that were heretofore reported, as required by law, as members of CalPERS, as well as other employees of cities, counties and special districts who will not meet the tests embodied in this regulation. You also contend elsewhere in your letter that "The proposed regulation ... will disenfranchise hundreds of workers and classified employees who have participated for many years in good faith as members of CalPERS."⁴

Response to Comment 2. CalPERS staff disagrees with your comment. The proposed regulations will not eliminate CalPERS eligibility for membership for CalPERS participating employers' common law employees. To the extent that

¹ This is consistent with the California Supreme Court's discussion of this issue in *Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 506 (also referred to as *Cargill*).

² See *Cargill*, *supra*, 32 Cal.4th 491..

³ See *In the Matter of the Application for CalPERS Membership Credit by Lee Neidengard v. Tri-Counties Association for the Developmentally Disabled*, Precedential Case No. 05-01 (2005) (*Neidengard*), and *In the Matter of the Application to Contract with CalPERS by Galt Services Authority*, Precedential Decision No. 08-01 (2008) (*Galt Services Authority*).

⁴ These contentions rest on your bare assertion that large numbers of individuals currently being reported as CalPERS members will be excluded from membership eligibility as a result of these regulations. CalPERS staff disagrees with this assertion. No specific examples were provided to substantiate the assertion. It should be noted that the facts that might substantiate your prediction are currently the subject of litigation and cannot be decided in this regulation process.

individuals are not the common law employees of CalPERS' employers, they will have been reported as CalPERS members in error. Where CalPERS discovers such errors in membership reporting, corrective action is taken on a case-by-case basis. If ultimately a determination is made that an individual fails to qualify for CalPERS membership under the common law test for employment, then service credit must be backed out and member contributions refunded.

You also contend that the regulations are now being brought forward to "narrowly interpret employment relationships" in an effort to reinforce a disputed decision regarding existing county superintendent employees working with CCSESA. CalPERS staff disagrees with this contention but will not comment on the pending administrative case in responding to comments about the proposed regulations. The proposed regulations have been promulgated to interpret the PERL, case law and Board Precedential Decisions which already use the criteria described in the proposed regulations to make employee and/or eligibility determinations for CalPERS purposes.

Comment 3. "The regulation misapplies the findings of the Supreme Court case of *Cargill v. Metropolitan Water District* (2004) 32 Cal.4th 491 to craft a narrowly drafted regulation intended to exclude employees from the CalPERS system."

Response to Comment 3. CalPERS staff, again, disagrees with your comment.

The regulations do not misapply the *Cargill* decision and were not drafted with the intent to exclude employees from the CalPERS system. As noted above, the proposed regulations require that the term "employee" be determined using the common law test for employment.

The regulations are authorized because Government Code section 20125 provides that the Board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system. The California Supreme Court in *Cargill* determined that the PERL incorporated the common law test for employment and referred to the common law test for employment factors identified in *Tieberg*⁵.

Although the Court in *Cargill* referenced the common law test for employment to provide CalPERS pension benefits to the common law employees of the Metropolitan Water District, CalPERS has also used the same test to determine employee status and eligibility and/or deny eligibility for pension benefits to any persons who are not the common law employees of a CalPERS employer. The Board recently discussed this in a Precedential Decision stating: "as the California Supreme Court held in *Metropolitan Water District v. Superior Court* (2004) 32 Cal.4th 491, 509 (*Cargill*), when determining

⁵ See *Tieberg v. Unemployment Ins. App. Bd* (1970) 2 Cal. 3d 943 (*Tieberg*)

whether individuals are employees of a public agency, CalPERS must apply the common law test for employment.”⁶ The Board adopted the Administrative Law Judge’s decision upholding a CalPERS determination that the common law test for employment also may be used to deny pension benefits to any persons who are not common law employees of the employer.

You also comment that staff’s rationale for the regulations failed to consider a prior Board decision that “recognizes employment relations of the county superintendents that would be deemed ineligible under the application of this proposed regulation.”⁷

Staff disagrees with your interpretation. The case mentioned was not designated as Precedential by the Board and is therefore limited to its own specific facts, and has no binding effect on the Board as to future matters. Furthermore, although the decision may have lacked clarity in its drafting, the decision ultimately found the employer who had contracted with CalPERS to be the common law employer of the employees who were reported into CalPERS membership, and as such, the employees of that employer were found to be eligible for membership.

Comment 4. The proposed regulation is vague and open to subjective and arbitrary application.

Response to Comment 4. CalPERS staff disagrees with your comment.

The proposed regulations incorporate the applicable common law factors used in determining employee status for CalPERS membership eligibility as discussed in the *Cargill* and *Tieberg* Supreme Court cases. The Precedential Decisions referenced above illustrate how the factors are to be applied when determining whether an entity is the common law employer of specific individuals.

CalPERS staff does not agree that the factors are vague or subject to arbitrary application. Rather, the factors have been discussed and applied by both the California Supreme Court and the Board in two Precedential Decisions.

We again thank you for your comments and hope this letter helps you gain a better understanding of the proposed regulations. CalPERS staff will be recommending the Board adopt the proposed regulations as drafted.

⁶ See *Galt Services Authority*, supra, Precedential Decision No. 08-01 (2008).

⁷ *In Re the Matter of Sonoma County Office of Education, Santa Rosa Junior College District, College Legal Services of California, Henry, Shumway and Sisneros*, CalPERS Case Nos. N2004080538, N2004080539, N2004120064.

Please note that a public hearing on the proposed regulatory actions by CalPERS which was originally scheduled for December 17, 2008, will be held on December 16, 2008, during the Benefits and Program Administration Committee Meeting scheduled to begin at 8:30 a.m., in the Lincoln Plaza North Auditorium at 400 Q Street in Sacramento.

Sincerely,



Lori McGartland, Chief
Employer Services Division